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OCT 30 1958
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Supreme Court of the United States

October Term, 1958

No. 437

MARVIN RUBIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ISIDOR ENSELMAN,
Attorney for Petitioner.

JOHN T. SULLIVAN,
Of Counsel.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully shows:

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit in connection with which a Writ of Certiorari is sought hereby was entered on August 11, 1958. On September 9, 1958, Mr. Justice Harlan granted an extension of time within which to file this petition to and including October 10, 1958.

Jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C. Section 1254.

Opinions Below

The opinion of the Court of Appeals is not yet reported. A true copy of the same is attached hereto and designated as Appendix to Petition.

Questions Presented

(1) Whether the trial court committed reversible error in making a ruling during the testimony of the first important Government witness that existing previous statements of Government witnesses need not be produced unless defendants' counsel demonstrated an inconsistency between the testimony of the witness and the contents of the statement sought to be produced.

(2) Whether the Court of Appeals was correct in designating the trial court's concededly erroneous ruling as "harmless error" because of the enactment of the supervening statute enacted by Congress (18 U. S. C. Sec. 3500 (a) (b) (e) (1) (2) as a result of the decision of the Supreme Court of the United States in *Jencks* v. *United States* (353 U. S. 657).

(3) Whether the Court of Appeals may accept and predicate its decision on documents which were not part of the trial record and which contradicted the sworn testimony of the Government's own witness.

(4) Whether the Court of Appeals erred in completely disregarding the contention of petitioner herein that the admitted error of the trial court, as clearly enunciated in the *Jencks* case, applied not only to the first Government witness as to whose testimony the production of a previous statement was refused but also to all the subsequent witnesses who were not asked about such statements because of the trial court's emphatic exposition of his erroneous concept of the doctrine announced by this Court in *Gordon* v. *U. S.* (344 U. S. 414).

Statutes Involved

Petitioner, Marvin Rubin, was charged and convicted of violations of the two following Federal Statutes:

"Title 18 U. S. C.

Section 371. Conspiracy to commit offense or to defraud United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." (June 25, 1948, c. 645, § 1, 62 Stat. 701.)

"Section 201. Offer to officer or other person.—Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may by law be brought be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or

value of such thing or imprisoned not more than three years, or both.

This section shall not apply to violations of section 212 of this title." (June 25, 1948, c. 645, § 1, 62 Stat. 691.)

The following Statutes are also involved in this application:

"Section 3500. Demands for production of statements and reports of witnesses.—(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) The term "statement" as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of

such oral statement. (Sept. 2, 1957, P. L. 85-269, 71 Stat. 595.)

"Title 28 U. S. C.

Section 1254. Courts of appeals — Certiorari — Appeal—Certified questions.—Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire matter in controversy." (June 25, 1948, c. 646, § 1, 62 Stat. 928.)

"Title 28 U. S. C.

Section 2111. Harmless error. — On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." (June 25, 1948, c. 646, § 1, as added May 24, 1949, c. 139, § 110, 63 Stat. 105.)

Statement of Case

As the aftermath of a full-dress U. S. Senate Committee investigation complete with all the publicity and television trappings with which the nation has been regaled in recent years, the petitioner herein, together with eight other persons was charged in an indictment with a conspiracy to

defraud the United States Government in violation of Title 18 U. S. C. Sec. 371. The said petitioner was also charged in the second and third counts of the indictment with bribery in violation of Title 18 U. S. C. Sec. 201. Upon motion of the prosecution, a severance was ordered of the trial of three of the named defendants, including one, Joseph G. Porreca, a Government inspector who pleaded guilty and testified as a prosecution witness.

After a lengthy trial (six weeks), the jury rendered a verdict of guilty as charged against all the defendants except that petitioner and defendant David Pollack, a Government employee, who was charged in the second count of the indictment with accepting a bribe proffered by petitioner, were acquitted of the charges contained in the said second count. Petitioner was convicted under the first and third counts. The verdict of the jury included a request on the part of the jury for clemency as against all defendants. On May 15, 1957, petitioner was fined $1,000 on Count One of the Indictment and sentenced to fifteen months imprisonment on each of Counts One and Three, the same to run concurrently.

The offenses of which the defendants were convicted were alleged to have been committed in connection with procurement contracts for garrison hats for the U. S. Army Quartermaster Corps and white sailor hats for the U. S. Navy. The white hats were manufactured in Puerto Rico. The defendants were all men of previously unimpeachable honesty and integrity. Not one had ever been convicted or even accused of any previous offense. The principal Government witness was Leon Levy, an unindicted accomplice, who glibly and fearlessly testified to having participated in the commission of many crimes during his tenure of occupancy of the witness chair. He was shown to be a former business associate of defendants Rubin and Ades embittered because he had not been included in the subsequent business activities of his former associates.

The testimony of the defendant Porreca, the Government inspector who pleaded guilty prior to the trial and testified for the prosecution, was without doubt the evidence which tipped the scales against the defense. In his testimony before the Senate Committee and during the trial, he perjured himself almost endlessly. He frankly admitted he had perjured himself before the Senate Committee on cross-examination. For his assistance to the prosecution, he won himself a suspended sentence.

Both Leon Levy and Porreca had undoubtedly given and signed statements to several federal law enforcement agencies. Such statements would have been invaluable to defense counsel on cross-examination of these two admitted rogues. Request was not made for such statements because of the emphatic ruling of the trial Judge Hon. Irving Kaufman during the testimony of the first real witness called by the prosecution after some introductory testimony by an expert witness (340-395).[1]

At the first opportunity, after the direct testimony of this witness, Melvin Carlin, an accountant, Mr. Rubin's counsel, Mr. John T. Sullivan, inquired whether a statement had been given by the witness to any Government investigator (340-343).

After receiving an affirmative reply that such a statement had been given to investigators for the U. S. Senate Committee, demand was made for the production of the same. The following colloquy between Court and Counsel then ensued (346):

> "Mr. Sullivan: If the Court please, I ask for the production of that statement.
>
> Mr. Christy: No proper foundation for that, your Honor.
>
> The Court: I don't think you have laid any foundation merely by asking if a statement was given.

[1] Numbers in parentheses refer to the page in the certified transcript of the Record on Appeal herein.

Mr. Sullivan: What was your ruling, if your Honor pl ase?

The Court: I don't think you have laid sufficient foundation for the production of the statement?

Mr. Sullivan: I would ask the Court to look at the statement to see if there are any inconsistencies?

The Court: I don't think you have even laid a foundation for that."

Immediately thereafter, in questioning the witness concerning a most important document, a $1000 check, the proceeds of which it was contended by the Government was given to Rubin for alleged payoffs, the witness testified as follows (347-349):

"Q. Did you tell Mr. Poole and Mr. Balaban on your meeting with them the first time the Government agents talked to you that you had put that check under the category of 'Entertainment'? A. I posted it, yes.

Q. You posted it in the books yourself? A. Yes, I posted it myself.

Q. Now, did you tell Mr. Poole and Mr. Balaban that it was you who posted it under the category 'Entertainment'? A. I don't know whether I did or didn't. It is in my handwriting. If they asked me, I must have surely said that I did.

Q. When you posted that thousand dollars under the category 'Entertainment', had you looked at the checkbook of Bonita Originals, from which this check had been taken? A. Yes."

Thereafter the stub of the checkbook was put in evidence by counsel for Rubin as defendants' exhibit and the witness gave the following testimony (347-349):

"Q. Mr. Carlin, when you made the entry of one thousand dollars, did you observe that checkbook which said that the check 2213 was an exchange? A. I did."

Thus the Government witness, a certified public accountant, was forced to admit he had made a false entry in the company's books.

Thereafter further demand was made for the statement as follows (394-395):

> "Mr. Sullivan: If the Court please, may I address you?
>
> If your Honor please, according to the case of Gordon v. United States, 344 U. S. 414, it was my understanding having to do with the prior statement that I asked to be furnished to me, that was given to Balaban and Poole, it was my understanding that if I can tell your Honor of a specific statement, that then the rule is that you see the statement and observe if there is any inconsistency, and if there is, you give it to me; am I mistaken in that?
>
> The Court: That is substantially correct.
>
> Mr. Sullivan: Well, I did ask for the specific statement given to Balaban and Poole.
>
> The Court: I know, but you didn't point out that there was any inconsistency. That is the obligation.
>
> Mr. Sullivan: I don't have to, as I understand it.
>
> The Court: Oh, yes you do. You must at least indicate to me something that makes it appear that there might have been something inconsistent in that statement. Then I would read it over. But there wasn't the slightest indication. As a matter of fact, everything you brought out indicated that it was consistent. The mere request doesn't make it necessary for me to look at it. Otherwise the Court would be busy all day long looking at every possible document that had anticipated the case. You may show something inconsistent, because that is the only purpose upon which you could use it, or at least something that tends to make us believe that there was something inconsistent, and then the Court has an obligation to look at it.
>
> I am familiar with the entire line of cases."

Thus the Court once and for all the purposes of this trial made the far reaching ruling which effectively limited and hamstrung all defense counsel on cross-examination, exceptionally vital in this case, which turned for the most part on relatively uncorroborated verbal assertions of Government witnesses. Had counsel been able to secure the pro-

duction of previous statements by Carlin, Levy, Porreca and the other Government witnesses, the defendants might very well have been able to secure a verdict of acquittal from the jury. It is most significant that the jury during the course of its deliberations asked that the cross-examination of Carlin be read again and eventually recommended leniency after first inquiring whether leniency could be secured through them. The length of time they remained in session and their many requests for instructions all denoted a doubtful and troubled attitude on their part.

The Court made its ruling so clearly that subsequent requests for such previous statements of witnesses might very well have been deemed offensive and contumacious in the presence of the jury. If the Court had ruled properly on the law as enunciated in *Gordon* v. *United States*, *supra*. after counsel had expressly referred to the case, then, of course, subsequent requests for all such statements would have been in order. In such circumstances, counsel is certainly not required to indulge in repetitious requests and objections.

The Court's attention is called to the fact that the case at bar contains other manifestations of an erroneous conception on the part of the trial court as to the right of the defense to statements and documents in the possession of the Government. There were at least two matters of the same nature which were accorded the same treatment by Judge Kaufman. The witness Levy utilized a memorandum in Arabic to refresh his recollection. This was, of course, made available to defense counsel for their inspection but there were other memorandums or diaries also in Arabic which were in the possession of the prosecution which were not produced although counsel for the defense had in effect requested that they be turned over to defense. The colloquy between the Court, Mr. Christy and Mr. Gould, counsel for defendant Lev (55-57) amounts to a request for these

diaries and a refusal by the Court at the time of the request to turn them over. The Court stated as follows:

> "The Court: Very well, that apparently is it at the present time. There will be no direction 'now to turn' over all of them. If during the course of the trial it becomes apparent the other notes are important, then I will rule on it at that time." (The stenographer's minutes read "out of turn" but obviously the Court said "now to turn".

The Court further stated (53):

> "The Court: Whether or not you will be able to see any other part of the notes is another problem.
> Mr. Gould: Will depend on the state of cross-examination.
> The Court: That is correct.
> Mr. Gould: Very well, sir. I understand it very clearly.
> The Court: That will depend upon the state of the law."

Necessarily the request of counsel for the other Arabic notes utilized in the Senate investigation was based on even stronger and more compelling grounds than the request for Cariin's statement. Under no possible rule of law could the Court have refused to direct the turning over of these memos or even to have deferred ruling on same.

The same pattern was followed as to the minutes of the Senate Committee. The record of the public sessions in book form was distributed throughout the country to anyone asking for them; but the minutes of the closed or executive sessions were not made available to defense counsel. On the occasion when the Government made an offer of proof as to the testimony of defendant Pollack before the Senate on the theory of consciousness of guilt the Assistant District Attorney stated as follows (59-60):

> "We have provided defense counsel, at least Mr. Carroll, with a copy of the *Executive Testimony* of

> David Pollack from which testimony we wish to introduce certain parts, * * *." (Emphasis supplied.)

Thereafter Mr. Carroll, counsel for Pollack, stated:

> "Mr. Carroll: I have examined the seven pages of *selective quotation* which Mr. Christy submitted to us at the close of the last session, * * *." (Emphasis supplied.)

Apparently the Government didn't even furnish the full context of the executive testimony from which they proposed to read excerpts. It is submitted that these prejudicial actions of the prosecution stemmed from the original ruling of the trial court during the Carlin testimony.

Of course there cannot be the slightest doubt that under the doctrine of *Jencks* v. *United States*, decided shortly after this trial ended, the conviction of Rubin on both counts would have been reversed had it not been for the supervening enactment of Title 18 U. S. C., Sec. 3500 (a) (b) (c) (1) (2). In this connection, the opinion of Chief Justice Clark of the Court of Appeals stated as follows:

> "* * * Since the decision in Jencks v. United States, 353 U. S. 657, we know that the trial judge was in error in refusing the order on the ground that the defendants had not established inconsistencies between the statement and the witness' testimony. But before a new trial is to be ordered, we must see if the statement is in any event discoverable. * * *"

Thereafter the distinguished Chief Judge asserted that the U. S. Attorney had furnished the Court in a sealed envelope from the Senate Committee, a Senate investigator's summary of an interview with the witness Carlin, accompanied by an affidavit which, to use Judge Clark's word "establishes" that the summary submitted is the only written record made of Carlin's interview and that it was written following the interview and is not a substantially verbatim record of Carlin's statement.

Judge Clark then goes on to state that while defendants "may perhaps" have been given a right to inspect a statement of this nature by the *Jenck's* decision, the recent codification of discovery on this situation would not allow petitioner the right to examine the investigator's summary on a new trial and therefore the error is rendered harmless by the supervening statute.

There is not a single word in the opinion of the Court of Appeals which in any way disposes of the petitioner's contention that his defense was hampered and prejudiced from that point forward by the trial court's error which the Court of Appeals apparently holds would have required a reversal as to Rubin were it not for the enactment of the new Statute.

A reading of the pertinent excerpts from the record of the trial will demonstrate beyond even the slightest peradventure of doubt that regardless of whether the Senate investigator or the Government witness Carlin is telling the truth as to the existence of a statement signed by the witness Carlin, there are other such statements in existence as to other and more important Government witnesses which will certainly prove to be inconsistent judged by any standard and therefore available to petitioner under the new Statute upon a new trial.

Reasons for Granting the Writ

The reasons why petitioner believes a writ of certiorari should be granted herein are twofold:

Firstly, the decision of the Court of Appeals and the opinion of Chief Judge Clark are in conflict with applicable decisions of this Court to wit: *U. S.* v. *Jencks* and *U. S.* v. *Gordon, supra.*

Secondly, the Court of Appeals has decided an important question of federal law, i.e., the application of the new statute, Title 18—U. S. C., Sec. 3500(a)(b)(e)(1)(2), which has not been but should be settled by this Court.

I

The Trial Court committed reversible error in ruling during the testimony of the first important Government witness that existing previous statements of Government witnesses need not be produced unless an inconsistency between the testimony of the witness and the contents of the statement be shown.

The ruling complained of was made by the trial judge during the course of the lengthy trial which culminated with the jury's verdict on April 25, 1957, prior to the announcement by this Court on June 3, 1957 of its decision in *Jencks* v. *United States, supra.*

However, there can be no doubt that the Court's ruling constituted reversible error under the doctrine of the *Jenck's* case and also under *Gordon* v. *United States, supra.* which latter case was specifically called to the Trial Court's attention by counsel for petitioner. Moreover, the opinion of the Court below recognizes and concedes that by virtue of the decision in the *Jencks* case, reversible error was committed.

It is deemed most important that this Court fully comprehend the devastating consequence to the defense which ensued as a result of this ruling. The error permeated and tainted the entire trial from that point forward. The statement of facts set forth above and the excerpts from the testimony which are quoted demonstrate partially but by no means completely the improper prejudice to the defense which resulted from the Trial Court's curtailment of cross examination.

II

The Court of Appeals erred in designating the concededly erroneous ruling of the Trial Court as harmless error.

The argument advanced by the Court of Appeals in support of the proposition that Judge Kaufman's admittedly erroneous ruling constituted at most only harmless error is predicated upon a series of wholly unjust premises right at the outset. The Court virtually concedes that, absent the new statute, a reversal and a new trial would be required as to the defendant Rubin, and then by a process of accepting without any test of genuineness or credibility a gratuitous statement from some unidentified individual attached, or supposedly attached, to the Senate Committee staff together with what the Court characterizes as an "additional affidavit" which "establishes that the so-called" summary in the Senate envelope is the only written record of the witness Carlin's interview (although Carlin himself testified that he had signed a statement) the Court by invoking the precise clauses of the new legislative enactment imposes the provision of this statute *ex post facto* upon the proceedings of the trial which was held although the statute was not in existence or even thought of at the time. The weakness of the Court's argument as to these post trial additions to the record on appeal is nowhere more manifest than in the Court's own language. After stating that the "additional affidavit establishes" that the summary is the only written record made of Carlin's interview, although Carlin swore otherwise, and it "is not a substantially verbatim record of Carlin's statement". Then the Court goes on to say that—

> "We have examined the summary and internal evidence from it *tends* also to bear this out." (Emphasis supplied)

Whatever the mysterious "internal evidence" is, in any event it only *tends* to bear this out. One thing is certain, the defense has had no opportunity to ascertain whether this so-called summary is or is not a substantially verbatim record of Carlin's statement. No opportunity has been afforded to petitioner to put Senate Committee employees and affiants under oath to get at the truth of this curious business.

Parenthetically, it is readily apparent that the way is now open and clear for Government investigators to circumvent and emasculate even the meager and limited aids to the accused provided by this unwise and unjust statute. By merely wording their reports of oral statements in such a fashion as to negative any implication of verbatim recitals, they can be certain that defense counsel may never confound their witnesses with contradications between the testimony at the trial and the statements made at the time when the incidents testified to, actually occurred.

The opinion and conclusion of the Court below is not based upon the error and impropriety of the limitation of cross examination which was imposed upon the defense at the trial. It is derived from a fiction of what would happen at a new trial which in turn is based on premises which could very well turn out to be spurious if tested by a proper forum of inquiry where Senate investigators and employees could be placed under oath to determine the true nature of this summary.

III

The Court of Appeals exceeded its authority in accepting and predicating its decision on documents which were not part of the trial record and which contradicted the sworn testimony of the Government's own witness.

The infirmities of the procedure utilized by the Court of Appeals in accepting incompetent documents outside of the record to support its proposition that the violation of the doctrine of the *Jencks* and *Gordon* cases which occurred at the trial was only harmless error have been carefully spelled out in the preceding point. Suffice to say, the petitioner was entitled to have his appeal decided not on what may, as a matter of rank conjecture occur at an imaginary new trial which cannot take place in any event as of the present time, but on the hard cold facts of what did occur, i.e., the improper restriction of cross-examination by the Trial Court in a case which turned on very close questions of fact.

The rule of law that an appellate court may, on appeal, consider documents which are not part of the record of a trial is carefully limited in its scope. First of all such documents may never be considered or utilized in reversing a judgment or an order appealed from and secondly only *incontrovertible documents* may be so received. (*O'Connor-Sullivan, Inc.* v. *Otto*, 283 App. Div. 269, 127 N. Y. S. 2d 373 at page 377; Vol. 6 Carmody's New York Practice Sec. 316; *Latourelle* v. *New York Central Railroad Company*, 275 App. Div. 123, 89 N. Y. 2d 296.)

In *Stemmler* v. *The Mayor of New York*, 176 N. Y. 476 at page 483, the rule is limited to the reception of record evidence. *People ex rel. Warschauer* v. *Dalton*, 159 N. Y. 235, 239; *Wines* v. *Mayor, etc. of N. Y.*, 70 N. Y. 613; *Matter of Cooper*, 93 N. Y. 507; *Day* v. *Town of New Lots*, 107 N. Y. 148; *Dunham* v. *Townsend*, 118 N. Y. 281; *Atlantic Ave. R. R. Co.* v. *Johnson*, 134 N. Y. 375.

Thus public documents such as deeds or mortgages or records of a permanent public office engaged in a usual routine of business would appear to be the type of document permitted to be perused under the holdings of the cases. Certainly the summary and the affidavit described by the Court of Appeals in its opinion fall far short of any compliance with these standards. The Senate Committee is not in any sense a permanent continuing body of the nature of a County Clerk. Furthermore, only an ostrich could immunize itself from the unvarnished truth that the chairman, counsel and investigators of the Committee are not disinterested parties. In fact, the Committee's counsel has in recent weeks expressed severe criticism of the Attorney General of the United States for his failure to indict and convict on cases referred to him by them. They want convictions to support their proceedings and pronouncements.

The Court of Appeals clearly had no right under the rule to consider the summary and the affidavit submitted to them by the U. S. Attorney in their deliberations. Many unwarranted inferences and conclusions must necessarily be implied and speculated upon from these documents before the sworn testimony of the Government witness is overcome and the conclusions of the Court of Appeals that the summary is the only written record of Carlin's interview and would not be as discoverable under the new statute, can be made digestible.

IV

The Court of Appeals erred in completely disregarding petitioner's contention that the trial court's erroneous ruling on the production of previous statements limited the cross-examination as to all subsequent witnesses.

Assuming, *arguendo*, that the Court of Appeals was correct in designating the trial court's error as harmless in the light of the new statute and the documents furnished to it for its appellate deliberations by the Senate Commit-

tee, it is respectfully submitted that this court should grant Certiorari in any event because of the devastating effect which the ruling in question exercised upon the cross-examination of all other witnesses. In a new trial, the Government would be forced to produce, for the trial court's inspection and for use by defense counsel, previous statements made by the two principal witnesses, Leon Levy and Joseph Porreca. Levy, the unindicted, self-confessed criminal, undoubtedly gave many statements to federal law enforcement agencies. Porreca, the chief inspector who bought his freedom from incarceration by his testimony, may very well have purchased his emancipation from many other prosecutions by his testimony if the truth could be brought out on cross-examination. He had the effrontery to testify that although he has supervised numerous other contracts as to the vital inspection and acceptance, this was the only time he ever was paid anything. His testimony on cross-examination as to the deep freeze is susceptible of only one interpretation. He extorted it from Rubin (1229-1324).

On a new trial, the Government would be forced to produce the full minutes of the closed sessions of the Senate Committee and the full text of the Arabic diaries which were not given to defense counsel at the trial.

As has been stated hereinbefore, the trial court's erroneous ruling permeated and tainted the entire trial, from the moment it was made down to the last word of the testimony of the last witness.

In *Elenkrieg* v. *Siebrecht*, 238 N. Y. 254, 263; 144 N. E. 519, the late Chief Judge Frederick Crane of the Court of Appeals of N. Y. stated:

> "It was not necessary for the defendant's counsel to except to the judge's charge in order to preserve the force and effect of his exception taken to the denial of his motion made at the end of the case * * * One exception upon the same ruling was as good as two."

See also *Stephens* v. *Ely*, 162 N. Y. 79; 56 N. E. 499. Note: Need not repeat same objection. *Church* v. *Howard* 79 N. Y. 415, 421; per Miller, J. See *Sherman* v. *Delaware etc.*, 106 N. Y. 542; 13 N. E. 616.

In *Kansas City Southern Ry. Co.* v. *Jones*, 241 U. S. 181, 183; Mr. Justice McReynolds stated as follows:

> "In such circumstances it was unnecessary to go through the idle form of articulating the obvious. If timely objection upon the ground ultimately suggested by the Supreme Court had been sustained, it could have been easily obviated * * *"

In *Brettman* v. *Braun*, 37 Ill. App. 17, 18, Gary, P.J. used the following language:

> "It is not really necessary that the court shall commit the same error more than once in the same case, to bring it before a court of appellate jurisdiction for review."

CONCLUSION

The petition for certiorari should be granted and the judgment affirming the conviction of petitioner reversed.

Respectfully submitted,

ISIDOR ENSELMAN,
Attorney for Petitioner.

JOHN T. SULLIVAN,
Of Counsel.

APPENDIX

Opinion of United States Court of Appeals, for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

No. 283—October Term, 1957

(Argued April 29, 1958 Decided August 11, 1958)

Docket No. 24809

—o—

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARRY LEV, MARVIN RUBIN, MAURICE ADES and RAYMOND WOOL,

Defendants-Appellants.

—o—

Before:

CLARK, *Chief Judge,*
and HINCKS and STEWART, *Circuit Judges.*

—o—

Appeal from the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge.*

Harry Lev, Marvin Rubin, Maurice Ades, and Raymond Wool appeal from their convictions of conspiracy to defraud the United States, 18 U. S. C. § 371, and Rubin also appeals from his conviction of bribery, 18 U. S. C. § 201. Affirmed.

—o—

ARTHUR H. CHRISTY, Chief Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., and Fioravante G. Perrotta and Joseph T. Altier, Asst. U. S. Attys., New York City, on the brief), *for appellee.*

MILTON S. GOULD, of Gallop, Climenko & Gould, New York City (George Trosk, of Gallop, Climenko & Gould, New York City, on the brief), *for defendant-appellant Harry Lev.*

JOHN T. SULLIVAN, New York City, *for defendant-appellant Marvin Rubin.*

THOMAS J. SHORT, of Dougherty, Ryan & Mahoney, New York City, *for defendant-appellant Maurice Ades.*

ALBERT H. TREIMAN, New York City, *for defendant-appellant Raymond Wool.*

CLARK, *Chief Judge:*

Harry Lev, Marvin Rubin, Maurice Ades, and Raymond Wool appeal from a verdict and judgment of conviction for conspiracy to defraud the Government in violation of 18 U. S. C. § 371. Rubin also appeals from a conviction for bribery in violation of 18 U. S. C. § 201. The defendants were indicted for a single conspiracy to defraud the United States in the administration and procurement of Government contracts. Alleged errors involve principally a claimed variance between a charge of a single conspiracy and proof of two, and a failure to order a statement from a Government witness delivered to the defense for use in cross-examination. Ades and Wool also claim an insuffi-

ciency of the evidence, as does Rubin with respect to the bribery charge.

The proof adduced at the trial below tended to show overt acts between February 1952 and about August 1953 involving the procurement and administration of two contracts awarded to Bonita Originals, Inc., for the manufacture of Army garrison caps, and overt acts in the period commencing in April 1953 and continuing on into 1954 involving the procurement and administration of a contract award to Spencer Manufacturing Corporation for the manufacture of white hats for the Navy. During the former period Ades was the president and owner of 50 per cent of the stock of Bonita, Rubin was employed by Bonita on a profit-sharing basis to deal with Government officials on the garrison cap transaction, and Wool, an Army officer in the Quartermaster Corps, was assigned the Bonita contracts for administration until they were completed. Lev was not involved in either the procurement or the administration of the Bonita contracts. But Lev, Ades, and Rubin were all interested in Spencer Manufacturing Corporation and involved in the procurement and administration of the white hat contract. Wool was appointed a Contracting Officer of the Armed Services Textile and Apparel Procurement Agency (ASTAPA) prior to the award of the white hat contract and participated in both the award and the administration of that contract. On this proof Judge Kaufman, for the defendants' benefit, charged the jury that in fact two separate conspiracies were involved—the Bonita conspiracy and the white hat conspiracy—although he expressed doubts as to whether it was improper to characterize the conspiracy as a single one.

Defendants urge that a fatal variance occurred between the indictment and the proof concerning the number of conspiracies, and that this error was compounded by confusion on this point in the court's charge to the jury. A claim of variance is not unusual in a conspiracy case, *United States* v. *Rosenberg*, 2 Cir., 150 F. 2d 788, 793, certiorari denied

326 U. S. 752, and the courts have not evolved clear lines for distinguishing single and multiple conspiracy situations. Cf. *Blumenthal* v. *United States*, 332 U. S. 539; *Berger* v. *United States*, 295 U. S. 78; *Kotteakos* v. *United States*, 328 U. S. 750; *United States* v. *Cohen*, 2 Cir., 145 F. 2d 82, certiorari denied *Cohen* v. *United States*, 323 U. S. 799; *Monroe* v. *United States*, D. C. Cir., 234 F. 2d 49, certiorari denied 352 U. S. 873; *Canella* v. *United States*, 9 Cir., 157 F. 2d 470. Here, although from Lev's vantage point the Bonita transaction was completely separate from the white hat transaction, from the viewpoint of the other appellants the conspiracy was a single one to defraud the Government in matters of war contracts. Thus as to Rubin, Ades, and Wool, who were involved in both transactions, there is, properly speaking, no variance. See *Canella* v. *United States, supra*, 9 Cir., 157 F. 2d 470; *cf. Blumenthal* v. *United States, supra*, 332 U. S. 539.

As Lev was involved only in the latter transaction, a more serious question of variance does arise as to him. In *Berger* v. *United States, supra*, 295 U. S. 78, 82, and *Kotteakos* v. *United States, supra*, 328 U. S. 750, 757, the Supreme Court set out the applicable rule in these circumstances: "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'effect the substantial rights' of the accused." In this Circuit the test applied has been stated as whether the conspiracies ultimately proved might have been joined in a single indictment and whether the trial was conducted so as to protect the rights of defendants who are not common to all conspiracies. *United States* v. *Cohen, supra*, 2 Cir., 145 F. 2d 82, 89. Although Lev claims that the confusion inherent in the indictment was compounded by the court's instructions, a thorough reading of the charge shows that Judge Kaufman was scrupulous in protecting Lev's rights. In fact it is apparent that the jury was able to differentiate between the evidence relevant to defendants involved in only one of the conspiracies, for it acquitted

defendant Pollock, who was alleged to be involved solely in the Bonita affair. It follows that the variance here was not prejudicial and was at most harmless error.

Ades and Wool claim that the evidence linking them to the conspiracy was insufficient to justify admitting in evidence against them the admissions of other conspirators. Two witnesses for the prosecution gave important evidence involving particularly statements by Rubin defining and particularizing the use of funds to pay for entertainment of and gifts to the Government inspectors. These were Carlin, accountant for Bonita, and Levy, secretary-treasurer and co-owner of Bonita. Levy's testimony particularly went into details of funds drawn by him for uses which Rubin's directions and explanations to him showed were improper, definitely bringing the others, notably Ades and Wool, into the conspiracy. Hence we must consider the independent evidence supporting the inference of participation in the conspiracy and justifying the receipt of this testimony against them.

The independent evidence linking Ades to the illegal plot shows that he was present at a meeting with Rubin in the spring of 1952 where Rubin allegedly stated that he would need 5 to 7 per cent of the contract price in order to entertain Government personnel. Ades then went to Puerto Rico, where he managed the factory which manufactured the caps and hats supplied the Government. There is testimony that, while running the plant in Puerto Rico, he induced a Government inspector, Ienni, to live at his apartment rent free; that he brought another Government employee named Schlesinger to Puerto Rico secretly under an alias; that he attempted to bribe another inspector, Watkins; that he wrote a letter attempting to have Forcillo, a Government inspector, removed because he was too tough; and that, even before the white hat contract was awarded, he was bragging that they would receive it.

As to Captain Wool, the proof was that he went to visit Rubin's office several times; that as the officer supervising

the procurement he granted valuable contractual deviations whenever they were requested, both in the Bonita contract and later to Lev; that he had several meetings with Lev before the opening of the bid on the white hat contract; and that as contracting officer he approved Lev's bid, although the pre-award survey showed that Lev had no machinery at all in Puerto Rico to manufacture the hats. There was testimony that in May or June 1953 Wool came to the Bonita office and took a topcoat and again, some children's dresses. There was further evidence from Rubin's doctor, Dr. Franklin, who testified that Rubin introduced Wool to him and that he treated Wool on nine separate office visits and rendered a bill for $265, which was paid by a check from the Bonita Corporation for $285 (thus including $20 for Rubin himself). Later when Rubin came to testify he said that Wool's affliction was deep-seated and of long standing, which no Army doctor had been able to reach, but which Dr. Franklin proceeded to cure by this course of treatment. This evidence stands uncontradicted on the record, and Wool (who did not testify) offered no satisfactory explanation of Bonita's making this payment for him. There was also considerable circumstantial evidence tending to show, when coupled with testimony as to statements made by an alleged coconspirator, that a month after the white hat contract was awarded Lev advanced him $5,000, which he used to complete payments on the purchase of a house. Later in testifying to a Senate committee investigating these frauds he claimed to have borrowed money and given a note to one Luciano, who denied this in testifying below. This testimony was presented by the Government to show consciousness of guilt. Thus the evidence offered as to both Ad s and Wool presents amply sufficient groundwork for the admission of testimony of statements by coconspirators and in particular for Levy's terribly devastating testimony, which, when believed by the jury, left no question of guilt.

Defendants Lev and Rubin assert that the trial court committed reversible error in refusing to order the Government to produce for their inspection a statement made by

Government witness Carlin to agents of a Senate investigating committee. Since the decision in *Jencks* v. *United States*, 353 U. S. 657, we know that the trial judge was in error in refusing the order on the ground that the defendants had not established inconsistencies between the statement and the witness' testimony. But before a new trial is to be ordered, we must see if the statement is in any event discoverable. Although the statement is not a part of the lower court record, the prosecutor—who did not have it at the trial—has procured from the Senate committee and presented to us in a sealed envelope a verified copy of a Senate investigator's summary of an interview with Carlin. An additional affidavit establishes that this summary is the only written record made of Carlin's interview, and that it was written following the interview and is not a substantially verbatim record of Carlin's statement. We have examined the summary, and internal evidence from it tends also to bear this out.

While defendants may perhaps have been given a right to inspect a statement of this nature by the *Jencks* decision, *supra*, 353 U. S. 657, 668,[1] the recent codification of discovery in this situation allows a defendant to examine only the following:

> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U. S. C. § 3500(e)(1)(2).

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[1] Here the Court said: "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial." While not specified, it seems inferable that the F. B. I. recording of the reports made orally was contemporaneous with the making of the oral statements.

As this statute will apply on a new trial of any of these defendants, and as under it discovery of the summary cannot be required, the trial court's error is rendered harmless, *United States* v. *Miller*, 2 Cir., 248 F. 2d 163, certiorari denied *Miller* v. *United States*, 355 U. S. 905.

There remains to be discussed Rubin's contention that there was insufficient evidence for the jury to have convicted him of bribery. We think the evidence quite sufficient. There was proof that Chief Inspector Porreca, whose duty it was to assign inspectors, upon a request had removed Forcillo from Puerto Rico and replaced him with a more lenient man. Thereafter Rubin sent Porreca a deep freeze, for which Bonita paid. Porreca later received some meat to put in the freezer. He testified that he never paid for any of this, nor was he ever asked to pay for it. This was enough evidence of violation of the bribery statute, 18 U. S. C. § 201. The defense efforts to show that nothing Porreca did actually defrauded the Government are irrelevant as the statute shows.

This important trial discloses a sad and sordid picture of Government agents yielding to rather cheap temptation, some willingly, some only under pressure. But there is another side to the story, of inspectors who stood out at all times against such debauchery of their obligations and who were transferred to other activities for their pains. It is to be hoped that they received no permanent setbacks in their careers, but eventually were accorded that proper respect which they so richly merited.

Convictions affirmed.